NO. 85-1656

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

O.L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

VS.

GREGORY ALLEN PETTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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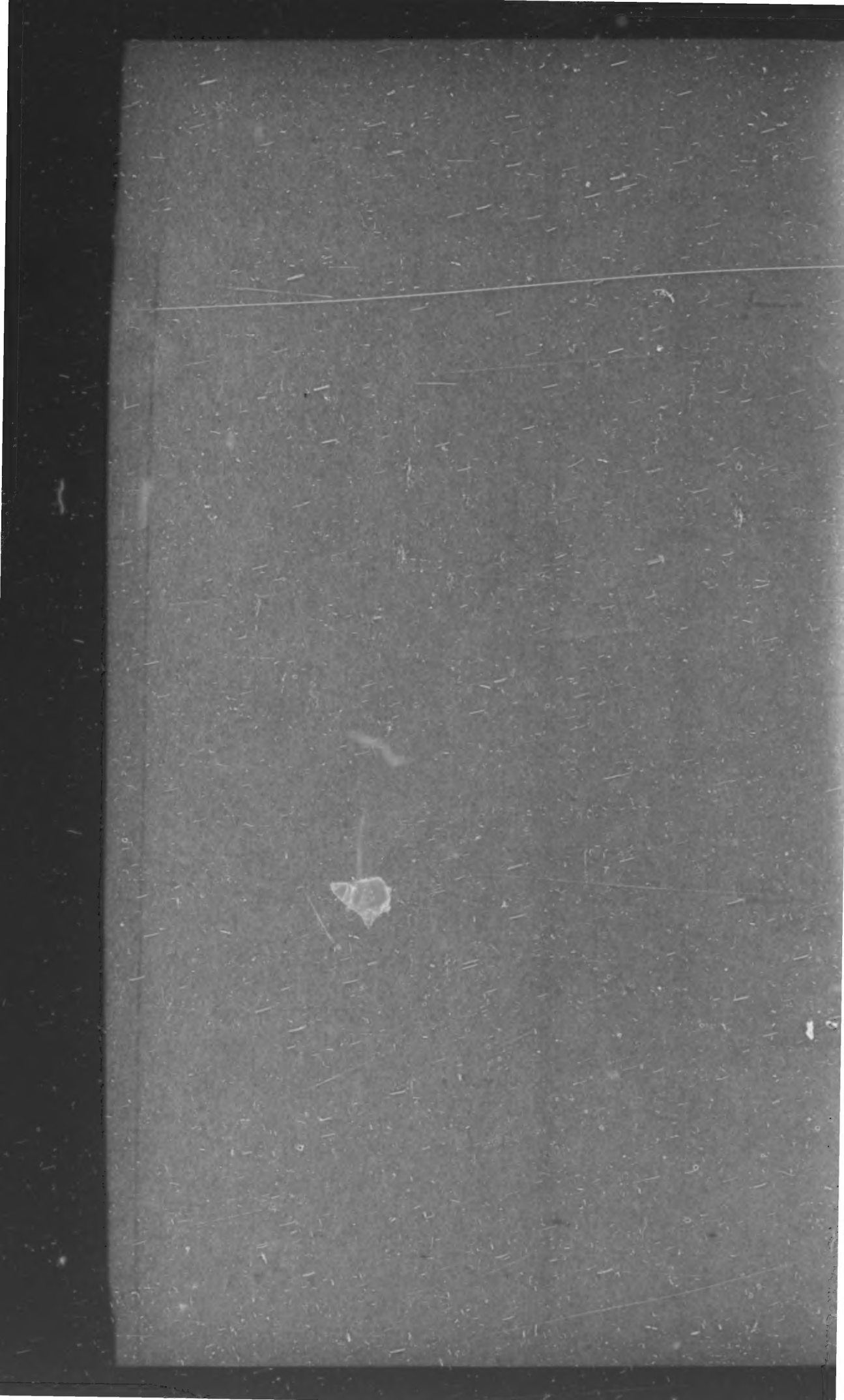
PETITION FOR CERTIORARI FILED APRIL 3, 1986
CERTIORARI GRANTED JUNE 30, 1986

31pp



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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY ALLEN PETTY, *Petitioner*	§	
V.	§	CIVIL ACTION NO. CA-5-84-034
D.V. McKASKLE, Acting Director, Texas Department of Corrections, *Respondent*	§	

DOCKET ENTRIES

3/7/84	Filed order permitting proceeding in the district court in forma pauperis
	Filed petition for a writ of heabeas corpus by a person in state custody
	Filed order to show cause, notice and instructions to parties
4/11/84	Filed respondent's answer and supporting brief
4/13/84	Filed state court records (A thru H)
4/19/84	Filed state court record (I)
4/24/84	Filed U.S. Magistrate's report and recommendation recommending that petitioner's application for WHC be denied.
5/14/84	Filed order denying application for writ of habeas corpus
	Filed judgment dismissing the application for writ of habeas corpus

5/24/84	Filed notice of appeal
6/4/84	Filed certificate denying certificate of probable cause
9/27/84	Filed certified copy of order from Fifth Circuit granting Petitioner's application for a certificate of probable cause

NO. 84-1488

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GREGORY ALLEN PETTY,
Petitioner-Appellant,

v.

O.L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent—Appellee.

DOCKET ENTRIES

7/5/84	Minute Entry—Notice of appeal being treated as CPC per FRAP RULE 22(b) filed
9/19/84	Order granting CPC & IFP (WG) filed
11/8/84	Brief for Appellant filed
1/9/85	Brief for Appellee filed
1/18/85	Order Appointing Counsel filed
7/9/85	Supplemental Brief for Appellant filed
9/19/85	Supplemental Brief for Appellee filed
11/4/85	Reply Brief for Appellant filed
1/3/86	Opinion Rendered
2/14/86	Petition for Rehearing filed (Appellee)
3/4/86	Order Denying Rehearing
3/11/86	Stay of Mandate (Appellee)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Gregory Allen Petty #296595	Texas Department of Corrections
PETITIONER (Full name and prison number of petitioner)	PLACE OF CONFINEMENT

VS.

D.V. McKaskle	CA-5-84-034
RESPONDENT (Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)	CASE NUMBER (To be supplied by the Clerk of the District Court)

and

THE ATTORNEY GENERAL OF THE STATE OF _____ ADDITIONAL RESPONDENT

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If the petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

INSTRUCTIONS - READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $50.00, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, *the original and two copies* must be mailed to the Clerk of the United States District Court for the Northern District of Texas at the appropriate division office whose address is:

DALLAS DIVISION
Room 15C22
1100 Commerce St.
Dallas, Tx 75242

FORT WORTH DIVISION
202 U.S. Courthouse
Fort Worth, Tx 76102

LUBBOCK DIVISION
Room C221
1205 Texas Ave.
Lubbock, Tx 79401

AMARILLO DIVISION
P.O. Box F-13240
Amarillo, Tx 79189

ABILENE DIVISION
P.O. Box 1218
Abilene, Tx 79604

SAN ANGELO DIVISION
201 Federal Building
33 E. Twohig
San Angelo, Tx 79603

WICHITA FALLS DIVISION
P.O. Box 1234
Wichita Falls, Tx 76307

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack:

   The 99th Criminal District Court of and for Lubbock, County, Texas

2. Date of judgment of conviction: September 6, 1979

3. Length of sentence: Fifty (50) Years

4 Nature of offense involved (all counts):
Aggravated Robbery, (One Count)

5. What was your plea: (Check one)

   (a) Not Guilty (X) (b) Guilty ( ) (c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

_____

_____

_____

_____

6. Kind of trial: (Check one)

   (a) Jury (X) (b) Judge only ( )

7. Did you testify at the trial?

   Yes (X) No ( ) Sentencing Only

8. Did you appeal from the judgment of conviction?

   Yes (X) No ( )

9. If you did appeal, answer the following:
   (a) Name of Court: The Court of Criminal Appeals Austin, Texas

   (b) Result: Affirmed this conviction

   (c) Date of result: April 27, 1983 Cause Number 64,750

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes (X) No ( )

11. If your answer to 10 was "yes", give the following information:

    (a) (1) Name of court: The 99th Criminal District Court of Lubbock County

(2) Nature of proceeding: Writ of Habeas Corpus under article 11.07 V.A.C.C.P.

(3) Grounds raised: Denied effective assistance of Counsel was ground of error one. A fundamentally defective indictment was ground of error two.

(4) D you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (X)

(5) Result: Denied without a hearing of any kind.

(6) Date of result: Around June or July of 1983.

(b) As to any second petition, application or motion give the same information:

(1) Name of court: Texas Court of Criminal Appeals

(2) Nature of proceeding: Writ of Habeas Corpus under article 11.07 V.A.C.C.P.

(3) Grounds raised: Denied effective assistance of Counsel was ground of error one. A fundalmentally defective indictment was ground of error two.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (X)

(5) Result: All matters was denied without written notice of any kind.

(6) Date of result: October 5, 1983

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding:_____

_____

(3) Grounds raised: _____

_____

_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result:_____.

(6) Date of result: _____

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes (X) No ( )

(2) Second petition, etc. Yes (X) No ( )

(3) Third petition, etc. Yes (X) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts*

supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

> Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the

prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right to appeal.

A. Ground one: Denied effective assistance of Counsel.

Supporing FACTS (tell your story *briefly* without citing cases or law):

The fact of this case vividly illustrate legal representation utterly failing to meet minimal constitutional standards. Viewed most charitably the performance of my court-appointed attorney was at best perfuncorty. As a preliminary matter it should be plainly stated that explanation for the substandard performance of Counsel in my case; is self-evident from the record believing me to be guilty of the offense charge, she naturally assumed that I would eventually enter a plea of guilty to the indictment, thereby the obviating the necessity for a jury trial and the investigation and preparation necessary incident to it. When I persisted in denying my guilt and demanding a trial, Counsel was (so to speak) caught flatfooted and was therefore compelled to defend the accusation in a state of virtually total unpreparedness. Failure to interview prospective defense witnesses prior to trial all of these circumstances explain what happened as clearly and as persuasively as if Counsel had candidly admitted that she did not feel it necessary to devote to much time to the case of a man she believed to be obviously guilty.

Counsel only conferred with me one time before trial. This interview was only to receive a brief knowledge of the case, and too deliver the Assistant District Attorney's plea bargain deal. This discussion was directed toward me making a possible plea

of guilty to the charge and further asking me, to consider the deal proposed by the State. Never was there a discussion of a possible defense and the address of my witnesses mentioned by Counsel.

Counsel negleted to explain the full legabity of the offense for which I was charged and indicted. Obviously the adequacy of a court-appointed attorney consultations with there client prior to trial cannot be evaluated simply in terms of the number of times or the length of there discussions. On the other hand, where (as here) a criminal defendant is facing the possibility of fifty (50) years which I ultimately received, and persistently maintains my innocence, there must certainly be a corresponding greater obigation on the part of an attorney in preparing for trial to assure thereself that they are thoroughly fimiliar both with the facts of the case from the State's perspective and the defendants version of those facts. Certainly, an attorney cannot render reasonably effective assistance unless they have acquated themself with the law and facts of the case.

B. Ground two: Fundalmentally Defective Indictment

Supporting FACTS (tell your story *briefly* without citing cases or law):

The indictment fails to allege the owner of the United States Currency. The indictment also fails to allege that the complainant, had a greater right to the currency than me, thereby it fails to allege and charge on offense upon which a conviction could be had, because it is fundalmentally defective on its face.

C. Ground three: The evidence is insufficient to support a conviction of aggravated robbery since the State failed to prove that I used or exibited a deadly weapon during the commission of the robbery.

Supporting FACTS (tell your story *briefly* without citing cases or law):

Testimony presented at trial shows no evidence of serious bodily injury to anyone or of the use or exibition of a deadly weapon during the commission of the robbery. The victim

admitted that the knife used in the initial confrontation had already been returned to my pocket prior to the taking of her purse and that the knife was never used as a threat during or for the purpose of the theft. The victim also admitted that she was not injured during the course of events that evening. She further testified that she believed that I was attempting to rape her. There is no evidence that the victim feared that she would be robbed. In fact, on numerous occasions, the victim testifed that she at no time felt threatened by or frightened of me until the incident was completed.

D. Ground four: The State failed to prove beyound a reasonable doubt that the knife used in the commission of the robbery was a deadly weapon.

Supporting FACTS (tell your story *briefly* without citing cases or law):

The victim testified that the knife was a regular size pocketknife with a blade approximately two and one-half to three inches long. She testified that the blade and tip was dull and that she suffered no cuts from the knife. The victim was a cook by trade and had some additional knoweldge as to the condition of knives. Testimony at trial indicates that the knife was not used as a deadly weapon. The record reveals that, at the time of the theft, the knife was never used nor displayed at a threat to procure the property of the victim. In this case the victim testified that I displayed a knife and threatened to harm her if she did not cooperate with my demand to remove her clothes. It was at this time that the victim determined that the blade and tip of the knife were to dull to do any bodily injury to her. When the victim was asked to remove her clothing, the knife was at most times visible to her; however, the victim admitted that, upon her refusal to remove her clothing, I folded up the knife with my hand, returned it to my pocket and took her purse which had fallen to the street during the scuffle.

E. Ground Five: Notwithstanding Defense Counsel's failure to object, the Honorable Trial Court errored in not admonishing me or otherwise obtaining a waiver of the privilege against self incrimination prior to requesting me to stand and further identify myself by opening my mouth during the trial.

Supporting FACTS

I was forced to stand and open my mouth for the view of the victim and the jury in order that the victim could make a positive in-court identification. There is no indication in the record that I was informed of my right against self incrimination, nor is there any indication that I waived my right knowingly and voluntarily. It cannot be presumed that I waived my privilege against incrimination without record of a free and voluntary waiver.

F. Ground Six: The Honorable Trial Court erred in admitting testimonial evidence reporting an "Impermissibly Suggestive" pretrial identification of me.

Supporing FACTS

The trial record reflects that the victim knew that she was going to the motel lobby to look at a suspect that the police had found. The indentification was made by the victim from a police car while I was standing inside the motel lobby. The reason that the identification was "impermissibly suggestive" is to the fact tht inside the lobby at the time of identification were two uniformed policemen, a white male (myself), and a black motel porter. Furthermore, the record reflects that the victim could not have been completely sure without determining if any teeth were missing from my mouth. This determination was never done at the pretrial identification by the victim. The fact remains that an identification was made under circumstances that lent themselves to not only suggestiveness, but also to uncertainty on the part of the victim herself. It is also significant that the only identification by the victim prior to trial was at the motel.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

_____

_____

_____

_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

    Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

    (a) At preliminary hearing: This is unknow by me.

    (b) At arraignment and plea: Wanda Wray
    812 Main Lubbock, Texas 79401

    (c) At trial: Wand a Wray
    812 Main Lubbock, Texas 79401

    (d) At sentencing: Wanda Wray
    812 Main Lubbock, Texas 79401

    (e) On appeal: George L. Thompson
    P.O. Box 10113 Lubbock, Texas 79408

    (f) In any post-conviction proceeding: _____

    _____

    _____

    (g) On appeal from any adverse ruling in a post conviction proceeding: _____

    _____

    _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

    Yes ( ) No (X)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ( ) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future:_____

_____

_____

(b) And give date and length of sentence to be served in the future: _____

_____

(c) Have you filed, or do you comtemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ( ) No (X)

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on Feb. 29, 1984 (date)

/s/

_____

Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY ALLEN PETTY,	)	
	)	
Petitioner	)	
	)	
vs.	)	No. CA-5-84-034
	)	
D.V. McKASKLE, Director	)	
Texas Dept. of Corrections,	)	
	)	
Respondent	)	

RESPONDENT'S ANSWER AND SUPPORTING BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Respondent, and files this answer and supporting brief, and would show the court the following:

I.

On September 7, 1979, in Cause No. 19914, 99th District Court of Lubbock County, Texas, a jury found Petitioner guilty of the felony offense of aggravated robbery and assessed Petitioner's punishment at 50 years in the state penitentiary. On April 27, 1983, the Texas Court of Criminal Appeals affirmed Petitioner's conviction, and Petitioner is presently confined pursuant to that conviction.

II.

In addition to Petitioner's direct appeal, in 1983, Petitioner also filed an application for writ of habeas corpus with the convicting court complaining of this same conviction. The issues raised by Petitioner in his direct appeal and his state habeas application are similar to the issues to the issues that Petitioner now raises to this court, and Petitioner may have exhausted his state remedies.

III.

Petitioner's issues are without constitutional merit.

(1) Petitioner contends that he was denied effective assistance of counsel. Respondent denies this allegation. Petitioneralleges that counsel failed to interview prospective defense witnesses, only conferred with Petitioner one time before trial, did not discuss with Petitioner possible defenses or possible witnesses, and was totally unprepared for trial. Petitioner wasnot entitled to perfect counsel nor is counsel to be judged by hindsight. Petitioner was only entitled to counsel reasonably likely to render and rendering reasonably effective assistance, and whether Petitioner received reasonable effective assistance is determined from a review of the totality of the representation furnished. *See Baldwin v. Blackburn,* 653 F.2d 942, 946 (5th Cir. 1981); *Nelson v. Estelle,* 642 F.2d 903, 906 (5th Cir. 1981); *MacKenna v. Ellis,* 280 F.2d 592 (5th Cir. 1960). To prevail, Petitioner must also demonstrate an identifiable lapse on the part of counsel and some actual, adverse impact upon the fairness of his trial resulting from such lapse, and mere conclusory allegations are insufficient to demonstrate ineffectiveness of counsel. *See Blackledge v. Allison,* 431 U.S. 63, 75-76 (1976); *Rubio v. Estelle,* 689 F.2d 533 (5th Cir. 1982); *Sneed v. Blackburn,* 569 F.2d 854 (5th Cir. 1978); *Bryant v. Elliott,* 472 F.2d 572 (5th Cir. 1973).

Petitioner does not allege what pretrial investigation should have been conducted by counsel that was not conducted or how his defense would have been materially benefitted by any additional investigation by counsel; Petitioner does not allege what witnesses should have been interviewed by counsel that were not, does not allege what those witnesses would have testified to that would have been material to any defense of Petitioner, or that those witnesses would have in fact testified or that their testimony would have been admissible. Petitioner concedes in his petition that counsel did confer with Petitioner to receive a knowledge of the case, but Petitioner does not demonstrate how additional conferences would have benefitted counsel or any defense of Petitioner.

A review of the state records also reflect that counsel was appointed to represent Petitioner approximately two months prior to Petitioner's trial. It also appears that this same counsel had been appointed to represent Petitioner in another case in Cause No. 18594, 99th District Court, Lubbock County, Texas, on application for revocation of probation. It also appears that in Petitioner's present conviction another counsel also assisted petitioner's appointed counsel. The records reflect that Petitioner's counsel thoroughly voir dired the prospective jurors to obtain a fair and impartial jury, fully cross-examined the witnesses for the state which indicated that counsel was familiar with the facts and the law involved in this case, made reasonable objections to testimony and evidence, many of which were sustained, and made final jury argument. A review of the totality of the representation furnished to Petitioner by his counsel clearly shows that counsel loyally and competently represented Petitioner.

(2) Petitioner contends that the indictment was fundamentally defective. Respondent denies this allegation. Petitioner alleges that the indictment failed to allege "the owner of the United States currency" and also failed to allege "that the complainant had a greater right to the currency than 'Petitioner'." In his direct appeal, Petitioner complained of the indictment, but not not on these grounds. The Texas Court of Criminal Appeals found the indictment sufficient under Texas law. It was not until 1983 when Petitioner filed his application for writ of habeas corpus in state court that he raised these specific complaints to the indictment. To gain the attention of the federal court in collateral proceedings, Petitioner must demonstrate that the indictment was so defective as to deny the trial court of jurisdiction to try Petitioner. *See Branch v. Estelle*, 631 F.2d 1229, 1233 (5th Cir. 1980); *Haywood v. Wainwright*, 454 F.2d 733 (5th Cir. 1972). Petitioner's indictment tracked the state statutes involved, and conferred jurisdiction on the trial court to try Petitioner on that indictment. Secs. 29.02 and 29.03, Texas Penal Code. Not only did the indictment track the state statutes and confer jurisdiction on the trial court, the indictment also apprised Petitioner of the offense being charged, the criminal conduct he was expected to defend, and allowed Petitioner to plead jeopardy. Under these circumstances, the indictment was also sufficient under the federal constitution. *See*

Branch v. Estelle, supra. *U.S. v. Broome*, 628 F.2d 403 (5th Cri. 1980). *U.S. v. Contris*, 592 F.2d 893, 896 (5th Cir. 1979). Further, Petitioner's contention that the indictment did not allege who the owner of the currency was is without merit. The indictment specifically charged that it was "property of Edna Faye Mars, to-wit: good and lawful United States currency". Not only was that a sufficient allegation of ownership, Texas law does not require in an aggravated robbery indictment that it allege ownership of the property. *See Ex Parte McWilliams*, 634 S.W.2d 815 (Tex.Crim.App. 1982), *cert. denied* 103 S. Ct. 447, *Brown v. State*, 535 S.W.2d 640 (Tex.Crim.App. 1976); *Davis v. State*, 532 S.W.2d 626 (Tex.Crim.App. 1976). Nether is there any requirement under Texas law that the indictment allege that the complaintant had a greater right to the currency than did Petitioner. In an aggravated robbery indictment, it is not necessary that the separate elements of theft be alleged. However, those elements were fully explained and defined in the court's charge to the jury. *See Mann v. State*, 64 S.W.2d 53 (Tex.Ct.App. 1982); *Linville v. State*, 620 S.W.2d 130 (Tex.Crim.App. 1981); *Griffin v. State*, 614 S.W.2d 155 (Tex.Crim.App. 1981). Not only was the indictment not fundamentally defective under Texas law, and not only was the indictment sufficient under the federal constitution, Petitioner's admitted failure to raise these complaints to the indictment prior to or during his state trial constitutes a waiver of such complaints in these collateral federal habeas proceedings. *See Wainwright v. Sykes*, 97 S. Ct. 2497 (1977); *Rhodes v. State*, 650 S.W.2d 655, 671 (Tex.Crim.App. 1978); *Parr v. State*, 575 S.W.2d 522, 526 (Tex.Crim.App. 1978); *American Plant Food Corp. v. State*, 508 S.W.2d 598, 604 (Tex.Crim.App. 1974), appeal dismissed 419 U.S. 1098 (1974). *See* also *Santana v. State*, 658 S.W.2d 612 (Tex.Crim.App. 1983).

(3) Petitioner contends that the evidence was insufficient to prove that he used or exhibited a deadly weapon during the commission of the robbery. Respondent denies this allegation. This issue was raised by Petitioner in his direct appeal and that court, in its written opinion, found "From the manner and intent of its use as described by the complainant, the evidence is sufficient that the knife was a deadly weapon." That finding by the Texas appellate court is fully supported by the factual record, not clearly erroneous, and shall be presumed correct

in these collateral proceedings, Petitioner having demonstrated no exception to the presumption of correctness. *See* 28 U.S.C. Sec. 2254(d); *Sumner v. Mata*, 101 S. Ct. 764 (1981); *Minniefield v. Alabama*, 542 F.2d 947 (5th Cir. 1976). A deadly weapon is defined as anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. Sec. 1.07(11), Texas Penal Code. The indictment so alleged, and the court so charged the jury and a review of the record in the light most favorable to the prosecution clearly domonstrates that the jury could readily have found Petitioner guilty beyond a reasonable doubt of aggravated robbery under Texas law. *Jackson v. Virginia*, 99 S. Ct. 2781 (1979).

(4) Petitioner contends that the state failed to prove beyond a reasonable doubt that the knife used in the commission of the robbery was a deadly weapon. This same issue was discussed previously in paragraph (3) above, and the discussion of the law and the facts under that prior issue also established that this issue is without merit.

(5) Petitioner contends that the trial court erred in not admonising him or obtaining a waiver of his priviledge against self-incrimination prior to having Petitioner stand and opening his mouth during his trial. Respondent denies that Petitioner's constitutional rights were violated. First Petitioner concedes that no objection was made on this bases during trial. Although Petitioner raised this issue in his direct appeal, the appellate court refused to consider the issue since no objection or request was made and therefore nothing preserved for review. Under these circumstances, this complaint is waived in these collateral proceedings, Petitioner having demonstrated no good cause from failure to object or actual prejudice resulting to him. *See Engle v. Isaac*, 102 S. Ct. 1558 (1982); *Wainwright v. Sykes*, 97 S. Ct. 2497 (1977). During Petitioner's trial, the complaintant had testified that her assailant had some teeth missing and pursuant to that testimony, Petitioner was asked to stand and open his mouth, which he did, without objection. Although the complaintant said that she did not believe he had any bottom teeth missing but had some on the top missing at the time of the robbery, stated that she did recognize Petitioner. Having Petitioner open his mouth so the complainant could observe his teeth was a physical characteristic

outside the protection of the Fifth Amendment of the federal constitution much like a handwright exemplar, a voice identification, or the body itself. *See Gilbert v. California*, 384 U.S. 757 (1966). *See* also *Moulton v. State*, 486 S.W.2d 334, 337 (Tex.Crim.App. 1971).

(5) Petitioner contends that the trial court erred in admitting testimony regarding an impermissibly suggestive pretrial identification of Petitioner. Respondent denies that Petitioner's constitutional rights were violated. This issue was raised by Petitioner in his direct appeal, but the Texas Court of Criminal Appeals refused to consider this issue because no objection on this ground of error was urged to the trial court and therefore nothing was reserved for review under Texas law. Since no objections were raised by Petitioner at trial to any testimony regarding a pretrial identification of Petitioner by the complainant and since no objection was raised by Petitioner at trial regarding the complaintant's in-court identification of Petitioner, and since Texas law required such objections to be contemporaneously made, this issue is now waived in these collateral proceedings. *See Engle v. Isaac*, supra.; *Wainwright v. Sykes*, supra. Further, this issue is without merit under the facts of the case. The complaintant was walking home at night and was first approached by Petitioner within about eight feet of a street light, allowing her a clear view of Petitioner. Petitioner struck up a conversation with the complaintant and walked with her for approximately six minutes. They separated and a few minutes later again approached the complaintant and it was at that time that he assaulted and threatened complaintant and during the assault and threats spoke with the complaintant and complaintant had full opportunity to observe Petitioner, his physical appearance, and his clothing, as there was sufficient light from the moon that night. After the complaintant escaped from Petitioner, she ran to a friend's house and called the police. Within approximately ten to fifteen minutes after the assault by Petitioner, the complaintant was driven by police to a motel where she observed through a window of the motel Petitioner and identified him as the one that had assaulted and robbed her of her purse and other belongings. After Petitioner had consented to a search of his motel room, the belongings taken by Petitioner from the complaintant were recovered and identified by the complaintant. The

complaintant had given a full and complete description of Petitioner's physical appearance and clothing prior to the pretrial identification. All of this testimony was admitted without objection by Petitioner. At trial, without objection, the complaintant again identified Petitioner in-court, as her robber and assailant. Because of the quickness of time between the robbery and being taken to the motel where she identified Petitioner as the robber, and because of the full and lengthy opportunity the complaintant had to observe Petitioner prior to and during the robbery, the pretrial identification of Petitioner cannot be described as impermissibly suggestive. Further, the in-court identification of Petitioner was fully reliable, based upon lengthy observation of Petitioner prior to and during the commission of the robbery under conditions where she could fully observe Petitioner, his clothing and physical appearance, and any pretrial identification of Petitioner by the complaintant, was not such as to cause a misidentification of Petitioner when he was identified by complaintant in court. S.F. 65-95, 101-105.[1] Petitioner's in-court identification, from a totality of the circumstances, was not tainted by any pretrial identification, but was of reliable independent origin, and any testimony regarding the pretrial identification did not violate Petitioner's constitutional rights. *See Manson v. Barthwaithe,* 432 U.S. 98 (1977); *Allen v. Estalle,* 568 F.2d 1108 (5th Cir. 1978); *Blasingame v. Estelle,* 508 F.2d 668 (5th Cir. 1975).

IV

Petitioner was not convicted and is not confined in violation of the constitution, laws or treaties of the United States.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that Petitioner's application for writ of habeas corpus be dismissed or denied without an evidentiary hearing.

Respectfully submitted,

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1. S.F. refers to the statement of facts of Petitioner's state trial.

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Magistrate's report and recommendation in *Petty v. McKaskle,* No. CA5-84-034, United States District Court, Northern District of Texas, Lubbock Division

Attached to the petition for writ of certiorari as Appendix C.

Order denying habeas relief in
Petty v. McKaskle, No. CA5-84-034

Attached to the petition for writ of certiorari as Appendix D.

Final judgment in
Petty v. McKaskle, No. CA5-84-034

Attached to the petition for writ of certiorari as Appendix E.

Opinion of the Court of Appeals for the Fifth Circuit in
Petty v. McCotter, No. 84-1488

Attached to the petition for writ of certiorari as Appendix F.

Order of the court of appeals
denying rehearing in
Petty v. McCotter, No. 84-1488

Attached to the petition for writ of certiorari as Appendix G.